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No. 190

In the Supreme Court of the United States

OCTOBER TERM, 1946

ZACHARY BOZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	5
Summary of argument	11
Argument:	
I. A directed verdict of acquittal was properly refused on count 1 but not, we think, on counts 2 and 3	13
A. Count 1	14
B. Count 2	27
C. Count 3	33
II. The addition of the mandatory fines and penalty to the prison sentences which petitioner had begun to serve did not constitute an invalid increase of punishment	34
III. The charge to the jury was not unfair or prejudicial	36
Conclusion	39

CITATIONS

Cases:	
Abrams v. *United States*, 250 U. S. 616	32
Anderson v. *United States*, 30 F. 2d 485	17
Barron v. *United States*, 5 F. 2d 799	19
Barton v. *United States*, 267 Fed. 174	29
Borgia v. *United States*, 78 F. 2d 550, certiorari denied, 296 U. S. 615	23
Bradley, In re, 318 U. S. 50	36
Braswell v. *State*, 22 Ala. App. 119	36
Burk v. *United States*, 134 F. 2d 879	23
Cardinal v. *United States*, 50 F. 2d 166	30, 32
Colasurdo v. *United States*, 22 F. 2d 934	30
Collins v. *United States*, 20 F. 2d 574	16
Commonwealth v. *Hottle*, 139 Pa. Super. 128	36
Crabb v. *United States*, 99 F. 2d 325	29
Cvitkovic v. *United States*, 41 F. 2d 682, certiorari denied, 282 U. S. 871	21
Czarnecki v. *United States*, 95 F. 2d 32	29
DeGregorio v. *United States*, 7 F. 2d 295	29
Duckwitz v. *United States*, 15 F. 2d 195	30

726710—46——1

Cases—Continued

	Page
Fleisher v. *United States*, 302 U. S. 218	4
Galloway v. *United States*, 319 U. S. 372	32
Gebardi v. *United States*, 287 U. S. 112	18, 20
Girgenti v. *United States*, 81 F. 2d 741	28
Glasser v. *United States*, 315 U. S. 60	32
Grantello v. *United States*, 3 F. 2d 117	29
Haggerty v. *United States*, 5 F. 2d 224	19
Harris v. *United States*, 273 Fed. 785, certiorari denied, 257 U. S. 646	16
Hays v. *United States*, 123 F. 2d 53, certiorari denied, 315 U. S. 801	21
Jin Fuey Moy v. *United States*, 254 U. S. 189	16
Kelley v. *United States*, 61 F. 2d 843	29
Lempie v. *United States*, 39 F. 2d 19	32
Mangiaracina v. *United States*, 40 F. 2d 164	29
Mayer v. *United States*, 259 Fed. 216	22
Melling v. *United States*, 25 F. 2d 92	16
Mortensen v. *United States*, 322 U. S. 369	32
Nelson v. *Foley*, 34 S. D. 382	36
Occinto v. *United States*, 54 F. 2d 351	20
Otto v. *United States*, 29 F. 2d 504	29
Parente v. *United States*, 82 F. 2d 722	23
Partson v. *United States*, 20 F. 2d 127	17, 26
Patrilo v. *United States*, 7 F. 2d 804	28
Pinkerton v. *United States*, No. 719, last Term, decided June 10, 1946	18, 27
Rooney v. *United States*, 203 Fed. 928	17, 18
Rowley v. *Welch*, 114 F. 2d 499	36
Ruthenberg v. *United States*, 245 U. S. 480	17
Seiden v. *United States*, 16 F. 2d 107	17, 29, 39
State v. *Godwin*, 210 N. C. 447	36
Stilson v. *United States*, 250 U. S. 583	32
Sutton v. *United States*, 131 F. 2d 108	32
United Cigar Whelan Stores Corp. v. *United States*, 113 F. 2d 340	22
United States v. *Carlin*, 92 F. 2d 425	32
United States v. *Carpenter*, Fed. Cas. No. 14,727, 25 Fed. Cas. 298	21
United States v. *Cooper*, Fed. Cas. No. 14,863, 25 Fed. Cas. 627	16, 17, 20, 24
United States v. *Cusimano*, 123 F. 2d 611	23
United States v. *David*, 107 F. 2d 519	29
United States v. *Davis*, Fed. Cas. No. 14,928, 25 Fed. Cas. 778	21
United States v. *Dellaro*, 99 F. 2d 781	31
United States v. *De Vito*, 68 F. 2d 837	30, 32

Cases—Continued Page

United States v. *Dibella*, 28 F. 2d 805, certiorari denied, 278 U. S. 658 29

United States v. *Dobbs*, Fed. Cas. No. 14,972, 25 Fed. Cas. 376 21

United States v. *Dotterweich*, 320 U. S. 277 18

United States v. *Falcone*, 311 U. S. 205 23

United States v. *Gooding*, 12 Wheat. 460 18

United States v. *Harbison*, Fed. Cas. No. 15,300, 26 Fed. Cas. 130 ..... 17, 18, 24

United States v. *Hartwell*, Fed. Cas. No. 15,318, 26 Fed. Cas. 196, certified questions not here material answered, 6 Wall. 385 18

United States v. *Holte*, 236 U. S. 140 20

United States v. *Howard*, Fed. Cas. No. 15,401, 26 Fed. Cas. 385 25

United States v. *Jackskion*, 102 F. 2d 683, certiorari denied, 307 U. S. 635 23

United States v. *Johnson*, 319 U. S. 503 ..... 11, 15, 25, 26

United States v. *Logan*, Fed. Cas. No. 15,624, 26 Fed. Cas. 990 ..... 16, 17, 20, 24

United States v. *Mann*, 108 F. 2d 354 29

United States v. *Messina*, 36 F. 2d 699 29

United States v. *Petrie*, 59 F. 2d 1005 ..... 29, 32

United States v. *Pritchard*, 55 F. Supp. 201, affirmed *per curiam sub nom. Waters* v. *United States*, 145 F. 2d 240 ..... 17, 23

United States v. *Rabinowich*, 238 U. S. 78 20

United States v. *Snyder*, 14 Fed. 554 ..... 18, 19

United States v. *Stappenbeck*, 61 F. 2d 955 ..... 29, 32

Vukich v. *United States*, 28 F. 2d 666, certiorari denied, 279 U. S. 847 23

Wainer v. *United States*, 82 F. 2d 305, certiorari granted, limited to a question not here material, 298 U. S. 652, affirmed, 299 U. S. 92 21

Wood v. *United States*, 204 Fed. 55, certiorari denied, *sub nom. Rhea* v. *United States*, 229 U. S. 617, writ of error dismissed, 232 U. S. 731 22

Statutes:

Criminal Code, Section 332 (Act of March 4, 1909, c. 321, 35 Stat. 1152, 18 U. S. C. 550) 4, 17

Internal Revenue Code:

Sec. 2803 (a) and (g) 35

Sec. 2806 (f) 5

Sec. 2810 (a) 3, 5, 34

Sec. 2833 (a) 3, 5, 34

Sec. 2834 ..... 4, 6, 34

Sec. 3321 (a) 35

18 U. S. C. 231 32

18 U. S. C. 701 35

Miscellaneous: Page

Bishop, *Criminal Law* (9th ed., 1923), pp. 474, 469–470, 482–483, 486 ..... 17, 18

Clark and Marshall, *Law of Crimes* (4th ed., 1940):

Pp. 202, 203, 205, 206–207 ..... 17, 18

Pp. 213–214 33

Pp. 226–228 20

42 Cong. Rec. 1374 18

Encyclopedia Americana, vol. 9 33

May, *Law of Crimes* (4th ed., 1938), pp. 81–82, 85–86 ..... 17, 18

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OPINION BELOW

The opinion of the circuit court of appeals (R. 137–144) [1] is reported at 155 F. 2d 592.

JURISDICTION

The judgment of the circuit court of appeals was entered May 17, 1946 (R. 145). The petition

[1] Pursuant to stipulation (R. 147), the printed record consists of petitioner's printed appendix to his brief in the court below and the proceedings in that court. References to the printed record are designated "R." The stipulation provides that either party may refer to the certified stenographic transcript of the record on appeal below. This transcript has been forwarded to this Court by the clerk of the court below. References to the transcript are designated "Tr." Certain exhibits referred to herein have also been transmitted to this Court.

for a writ of certiorari was filed June 15, 1946, and was granted October 14, 1946 (R. 147). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Where the evidence did not show that petitioner had a proprietary interest in an illicit still, that he was entrusted at any time with its possession, custody or control, or that he did anything specific, in contrast with the proprietor of the still, in connection with the preparation and fermenting of the mash or supplying or transporting its ingredients, but where the evidence did disclose that, at the direction of the proprietor, petitioner did assist him several times a week in the operation of the still and in the manufacturing of alcohol, whether petitioner was properly convicted as an aider and abettor, and hence as a principal under Section 332 of the Criminal Code, in the commission of the offenses of—

(a) carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled, in violation of I. R. C., § 2833 (a) (charged in the first count);

(b) possessing or having custody or control of an unregistered still, in violation of I. R. C., § 2810 (a) (charged in the second count); and

(c) making and fermenting mash fit for distillation in an unauthorized distillery, in violation of I. R. C., § 2834 (charged in the third count).

2. Whether the addition of minimum mandatory fines and a mandatory monetary penalty to imprisonment sentences imposed earlier on the same day constituted an invalid increase of those sentences when service of the prison sentences had commenced before the addition of the fines and penalty.

3. Whether the trial judge in his charge to the jury was unfair and prejudicial to petitioner.

STATUTES INVOLVED

The pertinent statutes are as follows:

> I. R. C. (26 U. S. C.) § 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *
>
> I. R. C., § 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the

collector of the district[2] in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., § 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

Criminal Code, Section 332 (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in

[2] Registry is now made with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. See *Fleisher* v. *United States*, 302 U. S. 218, 219.

any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

A six-count indictment filed in the District Court for the District of New Jersey alleged that Nicholas Chirichillo, Ellen Vettor, petitioner, and Peter Milito violated various provisions of the internal revenue laws relating to liquor (R. 5–9). The first three counts charged that the offenses were committed on or about January 19, 1945. Count 1 (R. 5) alleged that the defendants engaged in and carried on the business of a distiller, and distilled a certain quantity of spirits,[2] with intent to defraud the United States of the tax on the spirits so distilled, in violation of I. R. C., § 2833 (a) (*supra*, p. 3). Count 2 (R. 6–7) charged that the defendants had in their possession and custody and under their control a still set up, which they had failed to register as required by law, in violation of I. R. C., § 2810 (a) (*supra*, pp. 3–4). Count 3 (R. 7) charged that they made and fermented about 600 gallons of mash

[2] The allegation that the defendants distilled a specified quantity of spirits was undoubtedly inserted for the purpose of averring that the defendants had actually commenced the business of distilling rather than for the purpose of alleging that they were guilty of the additional crime made punishable by I. R. C., § 2806 (f). That section penalizes "any person engaged in carrying on the business of a distiller" who "defrauds or attempts to defraud the United States of the tax on the spirits distilled by him * * *."

fit for distillation in a building not an authorized distillery, in violation of I. R. C., § 2834 (*supra*, p. 4).[4] Petitioner and Chirichillo were convicted after trial by a jury on all three of the above counts as well as on counts 4 and 5 (R. 2, 113), the two latter counts not being involved herein (see footnote 4).[5] Petitioner was sentenced to concurrent terms of imprisonment for two years on each of counts 1, 2 and 3, and to a fine of $100 on count 1, a fine of $100 and a penalty of $500 on count 2, and a fine of $500 on count 3 (R. 2–3, 115, 116, 117). On appeal by petitioner alone to the Circuit Court of Appeals for the Third Circuit, his conviction on counts 1, 2 and 3 was affirmed, but his conviction on counts 4 and 5 was reversed because of the insufficiency of the Government's proof, and the cause was remanded for entry of a judgment of acquittal on those counts (R. 140, 142–144, 145).

The evidence adduced by the Government, so far as it relates to counts 1, 2 and 3, may be summarized as follows:

At about one o'clock a. m. on January 19, 1945 (Tr. 7, 27), on information received from Ellen

[4] It is unnecessary to summarize the allegations of the last three counts. Count 6 (R. 9) did not concern petitioner and was dismissed (Tr. 4; R. 2). Petitioner's conviction on counts 4 and 5 was reversed by the circuit court of appeals (R. 140, 142–144, 145).

[5] A severance was granted as to Ellen Vettor (R. 1), who became a witness for the Government (R. 10). She subsequently pleaded guilty (R. 3) and was sentenced to imprisonment for a year and a day (R. 4). A verdict of acquittal was directed in favor of Milito (R. 2, 92, 94).

Vettor that an illicit still was located at a farmhouse on Cleveland Avenue, Woodbridge Township, New Jersey, state authorities searched the house, which was pointed out to them by Mrs. Vettor. The house was a 2½ story frame structure, apparently deserted, and without shades or furniture except for an old stove, a cot, some old blankets and some dishes found in the kitchen. (Tr. 6–8, 43; R. 34.) The officers found a 300-gallon capacity still, with the usual still paraphernalia (pipes, fittings, gauges, etc.), set up but not then in operation (Tr. 11, 21). The various parts of the still described in the testimony were located on floors other than the attic floor. (Tr. 11–12, 21, 22, 23; Ex. G–8, Tr. 42; R. 16.) There were approximately 2½ gallons of alcohol in the receiving tank (Tr. 11–12, 22, 46). No fire was in the boiler (Tr. 13).

The mash vats were in the attic and consisted of twelve 100-gallon hogsheads, six of which were filled with fermenting sugar mash (Tr. 11, 12, 21, 33, 45; Ex. G–4, Tr. 42). Fermenting mash consists of sugar, water, yeast and a "booster"; the cycle of fermentation is three or four days. The mash found by the officers was not "dead" but "swirling." (Tr. 34.)

Six 100-pound bags of sugar and, in addition, sixteen 200-pound bags of sugar which were "broken up", were found, some in the kitchen and some on the second floor (Tr. 11, 22, 43).

Also found in the kitchen were two pint bottles of alcohol (Tr. 47).

The evidence discloses that Chirichillo signed a lease for the farmhouse in October 1944, under an assumed name (Tr. 56–58; Ex. G–1,* Tr. 62; R. 11). He then made a small deposit and returned in about a week to make a further deposit and receive the key of the house. He requested that the furniture be moved by November 1. (Tr. 58, 59; Ex. G–2, Tr. 61.) Ellen Vettor accompanied petitioner on one of these occasions (Tr. 60; R. 11, 32, 33).

Mrs. Vettor, who had resided with Chirichillo as his housekeeper at his home in Elizabeth, New Jersey, for a period of six months, moved with Chirichillo into the farmhouse some time in October, 1944. He had told her he intended to make alcohol. The only article of furniture they brought to the farmhouse was a studio couch. (R. 10–11, 13.) Mrs. Vettor remained at the farmhouse with Chirichillo a month and a half or two months until she was taken to the hospital by Chirichillo on January 11, 1945 (R. 14, 30–31, 33–34, 83–84).

It was upon the testimony of Mrs. Vettor that the Government depended to convict petitioner and, aside from other testimony in respect of the leasing of the premises by Chirichillo, to detail the

* While the lease is undated it is a fair inference from the testimony that it was executed some time in October, 1944.

activities of the several defendants and their relationship to the illicit enterprise.[7]

Mrs. Vettor testified that after she and Chirichillo moved into the premises, Chirichillo, "Dominick", and a man whose name she could not recall, brought still parts into the house (R. 13–14, 15, 24). Chirichillo worked on the construction of the still, which was completed within several weeks (R. 15, 25, 34). Chirichillo brought in the sugar and was the only one who dumped the sugar into the tanks in the attic (R. 15–16); he also put the water and yeast in the vats (R. 33). The "cooking" during the daytime was done by Chirichillo and Dominick (R. 22).[8] Chirichillo would pass the finished product—the cans of alcohol—out through the kitchen window to a helper who would place it in an automobile to be taken to Newark—sometimes in Chirichillo's sedan and sometimes in Milito's truck. Dominick would help at times to load the alcohol, but petitioner was never on the outside. The alcohol was taken

[7] There was evidence that Mrs. Vettor was a heavy drinker (R. 34, 35, 36, 41, 43, 84–85), but the jury was charged that they should keep that consideration in mind in appraising her testimony (R. 104, 105), that as an accomplice they should scrutinize her testimony with care (R. 96), and that in weighing her credibility they should ask themselves whether her testimony was influenced by expectation or hope of reward, or threat (R. 98).

[8] While Mrs. Vettor did not know who did the "cooking" at night, she testified that petitioner was not at the farmhouse at night (see *infra*, p. 10).

to Newark about three times a week until Mrs. Vettor went to the hospital in January. When she accompanied Chirichillo on the trips to Newark, the alcohol would be in the car, and they sometimes followed Milito's truck and sometimes petitioner's car. Alcohol was not carried in petitioner's automobile. (R. 17–18, 19–20, 21, 23, 27, 29, 35.)[9] On these trips, Chirichillo would bring back bags of coal with which to heat the "cooker" and also cans (R. 21, 36).

Petitioner, Mrs. Vettor testified, was known to her as "Jack" (R. 15, 20, 40, 44); he was not at the still premises steadily; he would come around two or three times a week; he would take instructions from Chirichillo and help him around with the operation of the still; he would help Chirichillo in manufacturing the alcohol (R. 14–15, 18). While the still was operated both day and night, petitioner was at the premises only during the daytime (R. 22).

Both Milito and Chirichillo, when they took the stand in their defense, testified that they never saw petitioner at the farmhouse (R. 62, 88); petitioner did not take the stand.

Motions for a directed verdict of acquittal were made on behalf of petitioner both at the close of the Government's case (R. 45) and at the conclusion of all the testimony (R. 92).

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[9] Petitioner's conviction on a transportation charge (count 5) was reversed by the circuit court of appeals (R. 140).

SUMMARY OF ARGUMENT

I

Petitioner was properly denied a directed verdict of acquittal on the first count but not, we think, on counts 2 and 3.

A. *Count 1.* While the evidence does not disclose that petitioner had any proprietary interest in the still, clearly, by assisting Chirichillo in the operation of an illicit still, he aided and abetted him in carrying on the business of a distiller with intent to defraud the Government of the tax on the spirits distilled. Petitioner was hence responsible as a principal under the federal aider and abettor statute.

While only one with a proprietary interest is subject to the tax and is therefore the primary offender, there is nothing in the criminal statute itself or in its underlying policy which excludes the application of the aider and abettor concept of responsibility.

Opposed to the few scattered decisions upon which petitioner relies is a line of cases which, correctly, we submit, have utilized the aider and abettor principle in connection with workmen and other non-proprietors both in respect of the instant criminal statute and analogous statutes designed to foster the revenue from liquor. These cases find support in the decision of this Court in *United States* v. *Johnson*, 319 U. S. 503, a prosecution for income tax evasion.

B. *Count 2.* According to the evidence, the unregistered still was in Chirichillo's possession, custody, and control. To be guilty as an aider and abettor, petitioner's activity was required to be of some assistance to Chirichillo in the latter's maintenance of his possession, custody, or control of the still, an offense of narrow impact. The evidence in this respect is too general. Petitioner's activity is described only as helping Chirichillo in the operation of the still. Evidence which does not rise above the level of suspicion, surmise, speculation, or conjecture does not meet the test that the conviction must be supported by substantial evidence.

C. *Count 3.* Likewise, there is nothing in the evidence which specifically indicates that petitioner in any way assisted Chirichillo in making or fermenting the mash.

II

The mandatory imposition of fines and penalty on the three counts here involved on the same day the sentences to imprisonment were imposed, but after service of the latter sentences had begun, did not constitute an invalid increase of punishment, in violation of the "double jeopardy" provision. Petitioner was only serving an allowable segment of an incomplete sentence; there was no increase in that portion of the sentence. All that the trial judge did when he imposed the fines and the penalty was, in essence, to complete the sentence which the law requires.

III

The charge of the trial judge, when the excerpts upon which petitioner relies are read in context, did not constitute "an animated argument" for conviction. It no more stressed the rights of the people in a criminal trial than those of a defendant charged with crime. Since the summations of defense counsel are not contained in the record, there is no way to estimate the need for a statement of the rights of the people. Additionally, upon objection by counsel for petitioner, the trial judge promptly instructed the jury that he had no intention of arguing for conviction, and he repeated this admonition several minutes later when counsel for Chirichillo repeated the objection.

ARGUMENT

I

A DIRECTED VERDICT OF ACQUITTAL WAS PROPERLY REFUSED ON COUNT 1 BUT NOT, WE THINK, ON COUNTS 2 AND 3

The Government's position is that petitioner should have been acquitted on counts 2 and 3 but not on count 1. The consequence would be that the fines and penalty assessed against petitioner under counts 2 and 3 would be set aside. The sentence of imprisonment for two years would stand, however, inasmuch as it was a concurrent sentence on all three counts and could have been imposed for the count 1 violation alone.

A. *Count 1.* Count 1 charged Chirichillo, petitioner and others with carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled (*supra*, p. 3).

It is not disputed that Chirichillo was proved to have committed this offense, and, hence, was properly convicted. Neither is it disputed that the Government proved that petitioner was at the farmhouse two or three times a week while the still was in operation,[10] at which times he helped Chirichillo operate the still and manufacture alcohol. And there can be no doubt under the evidence that petitioner assisted Chirichillo with knowledge that Chirichillo had no intention of paying the tax on the alcohol produced and with the intent to assist him in his criminal purpose. But petitioner contends that he was entitled to a directed verdict of acquittal because the Government's proof did not show that he had any financial interest in the still, its product, or anything at the farmhouse, or, indeed, that he had the financial means of acquiring such an interest and,

[10] There is nothing in Mrs. Vettor's testimony to indicate that petitioner's work at the still did not continue during the entire time the still was in operation. Hence there is no basis for petitioner's characterization of his activity as being that of a "mere casual" employee or laborer (Br. 2, 8, 11). Neither is there any basis for petitioner's assumption that his services consisted only of "cleaning the furnace, removing the ashes, garbage and the like" (Br. 11, 8). Mrs. Vettor testified that petitioner helped Chirichillo around in connection with the operation of the still (R. 18) and in manufacturing the alcohol (R. 14–15).

also, because there was no evidence that he was in any wise liable for the tax or that he had an inducement or purpose to defraud the Government out of the tax on the product that was distilled; "His sole interest," he says, "was the daily wage that he might receive" (Br. 11, 8).

There is nothing in the record to indicate that petitioner was working for Chirichillo at a daily wage. So far as the record discloses, he may have been a co-partner with Chirichillo in the illegal enterprise, or he may have assisted Chirichillo on some other basis. In any event, it was unnecessary for the Government to show that petitioner had any proprietary or financial interest in the still or its product or was subject to payment of the required tax. Even if he was merely a workman for Chirichillo, all that it was incumbent upon the Government to prove was that petitioner committed acts which furthered or assisted Chirichillo's criminal conduct, that at the time he committed such acts he knew that a crime was in process of commission, and that with such knowledge he acted with intent to aid and abet Chirichillo in his criminal activity. These are the elements which made petitioner responsible as a principal under the aider and abettor statute (*supra*, pp. 4–5) [11] and were the factors which the trial judge required the jury to find specifically before it could hold petitioner as an

[11] See *United States* v. *Johnson*, 319 U. S. 503, 515, 518.

aider and abettor (R. 102, 103), he having just previously instructed that there would be no basis for a finding that petitioner was himself engaged in the business of a distiller if he was merely an employee (R. 102), i. e., had no proprietary interest in the still. There can be no doubt that the evidence adduced against petitioner was sufficient to warrant a finding that, even if he was a mere employee, his activity was not colorless but of affirmative assistance to Chirichillo in carrying on his illicit distilling business, and that his aiding and abetting was done knowingly and wilfully, with the consequence, we submit, that he was equally guilty with Chirichillo as a principal by virtue of the aider and abettor statute.[12]

Petitioner rests his contention that a workman or one not having a proprietary interest in the business cannot properly be convicted, upon five cases which involved the instant or analogous statutes designed to insure the revenue from liquor: *United States* v. *Logan,* Fed. Cas. No. 15,624, 26 Fed. Cas. 990 (C. C. E. D. Tenn.); *United States* v. *Cooper,* Fed. Cas. No. 14,863, 25

[12] While the indictment did not specifically allege that petitioner was an aider and abettor, it is settled that an aider and abettor or an accessory before the fact may properly be charged directly with the commission of the crime itself. It is sufficient if the evidence discloses guilt on an aiding and abetting basis, provided, of course, that there are proper instructions presenting that concept of responsibility. *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 192; *Melling* v. *United States,* 25 F. 2d 92, 93 (C. C. A. 7); *Collins* v. *United States,* 20 F. 2d 574, 578 (C. C. A. 8); *Harris* v. *United States,*

Fed. Cas. 627 (C. C. E. D. Tenn.);[13] *Seiden* v. *United States*, 16 F. 2d 197 (C. C. A. 2); *Partson* v. *United States*, 20 F. 2d 127 (C. C. A. 8) (one judge dissenting); and *Anderson* v. *United States*, 30 F. 2d 485, 487 (C. C. A. 5), citing the *Logan* case. The rationale of these decisions, most vigorously articulated in the two jury charges by the same judge in the *Logan* and *Cooper* cases, is that only the proprietor can be considered as carrying on the proscribed business because he alone is required to see that the tax is paid. This, and the apprehension, expressed in the *Cooper* case, that every workman in a large distillery might be subject to prosecution under the statute, resulted either in the express rejection of the aider and abettor principle,[14] or its ignoring, if relied upon by the prosecutor.

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273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646; *United States* v. *Pritchard*, 55 F. Supp. 201, 203 (W. D. S. C.), affirmed *per curiam sub nom. Waters* v. *United States*, 145 F. 2d 240 (C. C. A. 4); cf. *Ruthenberg* v. *United States*, 245 U. S. 480, 483.

[13] The *Logan* and *Cooper* cases both involved jury charges delivered by the same judge. See *United States* v. *Harbison*, Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.).

[14] The jury charges in the *Logan* and *Cooper* cases were delivered before the enactment of the existing general aider and abettor provision in the Criminal Code (Act of March 4, 1909, c. 321, § 332, 35 Stat. 1152), but the common law aiding and abetting principle rejected in those cases was no different in substance or result from that embodied in the Code provision. See Clark and Marshall, *Law of Crimes* (4th ed., 1940), pp. 202, 203, 205; Bishop, *Criminal Law* (9th ed., 1923), pp. 474, 469–470; May, *Law of Crimes* (4th ed., 1938), pp. 81–82; see also *Rooney* v. *United States*, 203 Fed. 928.

Unless the primary statute indicates on its face that the aider and abettor principle does not apply, or unless there is some underlying policy consideration which dictates the exclusion of that principle,[15] it should be given full vitality in the

932 (C. C. A. 9). The absence of a federal common law of crimes did not exclude the utilization of recognized principles of common law criminal responsibility in the application of a federal criminal statute. *United States* v. *Gooding*, 12 Wheat. 460, 469, 471–472, 475–476; *United States* v. *Snyder*, 14 Fed. 554, 556 (C. C. D. Minn.); *United States* v. *Hartwell*, Fed. Cas. No. 15,318, 26 Fed. Cas. 196, 199–203 (C. C. D. Mass.), certified questions not here material answered, 6 Wall. 385; *United States* v. *Harbison*, Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.). The aider and abettor statute was designed only to eliminate procedural differences existing at common law as to accessories before the fact and principals in felony cases. See Clark and Marshall, *op. cit.*, pp. 202, 203, 205, 206–207; Bishop, *op. cit.*, pp. 474, 469–470, 482–483, 486; May, *op. cit.*, pp. 81–82, 85–86; 42 Cong. Rec. 1374; see also *Rooney* v. *United States*, 203 Fed. 928, 931–933 (C. C. A. 9); cf. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Gooding*, 12 Wheat. 460, 472, 475–476.

[15] Examples found in *Gebardi* v. *United States*, 287 U. S. 112, are: The purchaser of liquor is not regarded as an abettor of the illegal sale (p. 119); the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would not render the former an abettor (p. 123). Instances where, analogously, the conspiracy principle may not be applied in connection with substantive offenses are recited in *Pinkerton* v. *United States*, No. 719, last Term, decided June 10, 1946, as follows (slip opinion, p. 2): "One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U. S. 354, 355–356; *Gebardi* v. *United*

application of a federal criminal law. The Congressional mandate is that not only the one who directly commits the criminal act but whoever aids or abets him in its commission shall be held equally responsible as a principal. There is certainly nothing in the definition of the offense in the criminal statute here involved which forbids the application of the aider and abettor concept of responsibility. That statute merely purports to define, in the usual manner, the crime of the primary offender. True it is that the only one who can fall within that category is the proprietor, since he is the only one who is subject to the tax and hence the only one who can carry on the business of a distiller with the intent to defraud the Government of its revenue. If he accomplishes this without the witting assistance of others, as, obviously, he well may, he alone is responsible. But where others aid him, knowingly and intentionally, be they workmen or any other non-proprietors, there is no reason why they should not bear equal responsibility with him for the fraud on the revenue.[16] While this concept

States, 287 U. S. 112, 121–122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. *Gebardi* v. *United States*, *supra*."

[16] It has never been considered a barrier to the conviction of an aider and abettor that he cannot himself directly commit the substantive crime. *Barron* v. *United States*, 5 F. 2d 799, 801–802 (C. C. A. 1); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C. C. A. 7); *United States* v. *Snyder*, 14 Fed. 554, 556

applies to the large, ostensibly legal distillery, as well as the small, manifestly illicit distillery, such as is here involved, it holds criminally responsible only the culpable workman who knows that he is assisting an unlawful enterprise.[17]

Opposed to the few scattered decisions upon which petitioner is forced to rely is a line of cases which, in varying circumstances, have properly, we submit, utilized the aider and abettor concept in the application not only of the instant criminal statute but also of analogous statutes designed to foster the revenue from liquor and, hence, are at variance with the idea that only a proprietor may be convicted.[18] In *Occinto* v. *United States*, 54 F. 2d 351, 353 (C. C. A. 8), Laluna and Occinto were convicted of carrying on the business of a distiller with intent to escape

(C. C. D. Minn.); see also *Gebardi* v. *United States*, 287 U. S. 112, 120–121, fn. 5; Clark and Marshall, *Law of Crimes* (4th ed. 1940) pp. 226–228. Similarly, a person may be guilty of conspiracy although incapable of committing the substantive offense. *United States* v. *Rabinowich*, 238 U. S. 78, 86; *United States* v. *Holte*, 236 U. S. 140, 145; cf. *Gebardi* v. *United States*, *supra*, at 120.

[17] The extent of the muddied thinking which led the judge who delivered the *Logan* and *Cooper* charges (*supra*, pp. 16–17) to reject the application of the aider and abettor principle to workmen is illustrated by his statement in both cases that if he were to hold an employee criminally liable, it would follow that the employee would also be liable to pay the tax—a patent *non sequitur*.

[18] Some of these are later decisions of the same circuit courts of appeals which decided several of the cases upon which petitioner relies.

the tax on the spirits distilled. Laluna, the "main mover" in the illegal venture, had testified that Occinto "was helping me. Once in a while he come out there to help me." Referring to this as "abundant evidence of guilt," the court affirmed Occinto's conviction. See also *Hays* v. *United States*, 123 F. 2d 53 (C. C. A. 5) certiorari denied, 315 U. S. 801.

In *Cvitkovic* v. *United States*, 41 F. 2d 682, (C. C. A. 9), certiorari denied, 282 U. S. 871, one who claimed to be a mere employee of a distiller was convicted with others of carrying on the business without having given bond as required by law, an offense made punishable by the statute here involved. It was held that the trial court properly refused to instruct the jury that a person could not be convicted of aiding and abetting the commission of that offense (p. 684). See also *United States* v. *Dobbs*, Fed. Cas. No. 14,972, 25 Fed. Cas. 876, 878 (D. C. N. D. Miss.); *United States* v. *Davis*, Fed. Cas. No. 14,928, 25 Fed. Cas. 778, 779 (D. C. N. D. Miss.); *United States* v. *Carpenter*, Fed. Cas. No. 14,727, 25 Fed. Cas. 298, 299 (D. C. N. D. Ga.).

In *Wainer* v. *United States*, 82 F. 2d 305, 307 (C. C. A. 7), certiorari granted, limited to a question not here material, 298 U. S. 652, and affirmed, 299 U. S. 92, it was held that an employee, without proprietary interest, may be held accountable as an aider and abettor in the carrying on, with-

out payment of the required federal tax, of the business of a wholesale liquor dealer. "Obviously," said the court (p. 307):

> a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his efforts to its conduct and promotion, however slight his contribution may be.

The same conclusion has been reached in respect of employees of retail liquor dealers who carry on their business without the payment of the required federal tax. *United Cigar Whelan Stores Corp.* v. *United States,* 113 F. 2d 340, 346 (C. C. A. 9); *Mayer* v. *United States,* 259 Fed. 216, 217 (C. C. A. 6).

In *Wood* v. *United States,* 204 Fed. 55, 58 (C. C. A. 4), certiorari denied *sub nom. Rhea* v. *United States,* 229 U. S. 617, writ of error dismissed, 232 U. S. 731, an officer and an employee of a corporation which was carrying on the distilling business with intent to defraud the Government of its tax were held properly to have been convicted as aiders and abettors, as was one to whom the untaxed liquor was delivered and by whom it was sold.

It has been held that one who wittingly furnishes supplies to an illicit distiller to be manufactured into the contraband product is an aider and abettor in the carrying on of the unlawful

business. *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615; *Vukich* v. *United States*, 28 F. 2d 666, 668–669 (C. C. A. 9), certiorari denied, 279 U. S. 847. See also *United States* v. *Jackskion*, 102 F. 2d 683, 684 (C. C. A. 2), certiorari denied, 307 U. S. 635.[19]

One who assisted a distiller by hauling the raw materials to the still and the finished product away from it was likewise held to be an aider and abettor in the commission of the offense of carrying on the business of the distiller without giving bond. *Parente* v. *United States*, 82 F. 2d 722, 725 (C. C. A. 8).

And one who incites another to engage in the business of illicit distilling may be held accountable under the aider and abettor statute. *Burk* v. *United States*, 134 F. 2d 879, 881 (C. C. A. 5).

Additionally, it has been decided that one who made arrangements with an illicit distiller to purchase his product aided and abetted the carrying on of the distilling business without the necessary bond and with intent to defraud the Government of its tax. *United States* v. *Pritchard*, 55

[19] *United States* v. *Cusimano*, 123 F. 2d 611, 613 (C. C. A. 7), involving a supplier of sugar, finds no support for its apparently contrary holding in *United States* v. *Falcone*, 311 U. S. 205, upon which it relies. The *Falcone* case involved simply the problem whether, in a prosecution for conspiracy, there was evidence that the supplier knew that those to whom he sold were in the conspiracy.

F. Supp. 201 (W. D. S. C.), affirmed *per curiam sub nom. Waters* v. *United States,* 145 F. 2d 240 (C. C. A. 4). "In order to convict for the offense here involved," the court said (p. 203):

> it is not necessary that a defendant should carry on the business of a distiller personally, that he should be responsible for the labor, or interested as owner, or act as an agent in charge. It is enough that he aids and abets directly or indirectly the manufacture of the distilled spirits as a business, knowing that it is being carried on in violation of law. * * * Responsibility for crime is not limited under the federal statute to those who do the overt acts. It extends to all who knowingly and willfully take a hand in it, within the act defining a principal. * * *

In *United States* v. *Harbison,* Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.), the trial judge, in charging the jury, ruled that the owner of a distillery, who rents it to another, knowing that the latter intends to use it for distilling whiskey in violation of law, is guilty of aiding and abetting the unlawful manufacturer. In that case, in which the earlier *Logan* and *Cooper* cases (*supra,* pp. 16–17) in the same court were relied upon by the defendant, the judge exposed the "imaginary" nature of the hardship which would ensue if the aider and abettor concept were applied to workmen and other employees in a large distillery, when he said (pp. 130–131):

> * * * It is a necessary doctrine that all who knowingly aid are alike guilty. A thousand may be as much so as one, if they have common knowledge of illegality. The imaginary hardship of this doctrine is wholly answered when it is conceded that a laborer or other employe, without any knowledge that the law was violated, would be innocent. While the principle goes no further than to hold all guilty who, directly or indirectly, knowingly participate in the commission of the offence, neither justice nor policy would restrain its full application. * * *

See, also, *United States* v. *Howard,* Fed. Cas. No. 15,401, 26 Fed. Cas. 385 (D. C. W. D. Mo.).

Finally, although in a different setting, the concept that others than the person whose duty it is to pay a federal tax may be held accountable as aiders and abettors, and consequently as principals, in the offense of tax-defrauding, is settled, we think, by the decision of this Court in *United States* v. *Johnson,* 319 U. S. 503, 513–515, 518, an income tax evasion prosecution. There this Court said that all who consciously contribute to furthering such an illicit enterprise and who share in its execution are aiders and abettors in the commission of the offense and hence chargeable, under the aider and abettor statute, as principals, "whatever may have been the different roles of leadership and subordination among themselves." (p. 515). Plainly,

this standard of culpability is broad enough to embrace one who, like petitioner, knowingly and wilfully assists another to carry on the business of a distiller with intent to defraud the Government of the tax on the spirits distilled, even though his role may have been that of a hired laborer.[20]

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[20] In *Partson* v. *United States*, 20 F. 2d 127, 129 (C. C. A. 8), in which the evidence was treated as disclosing that Partson was a workman for one Clausen who was operating the still, it was held not only that Partson could not be considered as carrying on the proscribed business because he was not the proprietor and hence was not responsible for the tax, but that there was no substantial evidence that Partson had any inducement or purpose to defraud the Government out of the tax. Similarly, petitioner asserts that there was no proof that petitioner "had an inducement or purpose to defraud the government out of the tax on the product that was distilled" (Br. 11). It should be noted, however, that there is not a word in the *Partson* opinion indicating that any consideration was given to the aider and abettor principle of responsibility. The court was speaking of Partson purely in the sense of being a primary offender. Moreover, the aider and abettor concept could never be applied where the offense involves the carrying on of a particular business with intent to defraud the United States of its revenue unless it suffices to show that the aider and abettor knowingly and intentionally assists the proprietor in the carrying on of his fraudulent business, regardless of the aider and abettor's primary inducement, for, if petitioner's theory were applied, it is evident that the aider and abettor, not being liable for the tax, is not in a position personally to defraud, and, hence, will never have tax evasion as his principal motivation. *United States* v. *Johnson*, 319 U. S. 503, *supra*, sustaining the convictions of aiders and abettors of a tax defrauder, completely refutes petitioner's argument.

B. *Count 2.* Count 2 charged Chirichillo, petitioner, and others with having in their possession and custody and under their control a still set up which they had failed to register with the District Supervisor of the Alcohol Tax Unit by subscribing and filing with the Supervisor certain written statements (*supra,* pp. 3–4).[21] It is our opinion that the evidence was not sufficient to support this count and, therefore, petitioner's motion for a directed verdict of acquittal should have been granted as to it.

Although the Government had in Mrs. Vettor a witness who was peculiarly in a position to detail the relationship to the enterprise of the various persons she named, there is nothing in her testimony, or elsewhere in the evidence, to indicate that petitioner had any proprietary or financial interest in the still, or that he was ever entrusted, by whoever may have been its owner, with the possession or even with custody or control of the still for any interval of time.[22] In-

[21] The statements required by the statute to be filed with the Supervisor are "duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used" (*supra*, p. 4).

[22] There was no charge in the indictment that a conspiracy existed and no such concept of responsibility was submitted to the jury. Cf. *Pinkerton* v. *United States*, No. 719, last Term, decided June 10, 1946.

deed, the fair inference from her testimony is that the still was solely in Chirichillo's possession, custody and control until it was seized by the state officers. According to her testimony, Chirichillo told her he intended to make alcohol, leased the farmhouse in which the still was erected, worked on the construction of the still, brought in ingredients for the mash and fuel for heating the cooker, fed the ingredients into the mash vats, participated in the cooking of the mash, transported alcohol to Newark, and lived in the farmhouse until apparently about the time the still was seized by the authorities. All that we know about petitioner's activity we learn from Mrs. Vettor's testimony, and we think that when she testified that petitioner helped Chirichillo in the operation of the still and in manufacturing the alcohol, helped him around, taking directions from Chirichillo, her testimony is fairly understood as meaning that petitioner, under Chirichillo's direction, helped him while Chirichillo was present. In any event, there is nothing in her testimony to indicate that the still was left in petitioner's custody or control at any time. Under the authorities there was clearly no basis for the conviction of petitioner as the principal offender solely because he helped Chirichillo in the operation of the still. *Girgenti v. United States*, 81 F. 2d 741, 742 (C. C. A. 3); *Patrilo* v.

United States, 7 F. 2d 804, 805 (C. C. A. 8)[23] *De Gregorio* v. *United States*, 7 F. 2d 295, 296 (C. C. A. 2); cf. *Czarnecki* v. *United States*, 95 F. 2d 32, 35–36 (C. C. A. 3); *Kelley* v. *United States*, 61 F. 2d 843, 848 (C. C. A. 8); *Mangiaracina* v. *United States*, 40 F. 2d 164, 166 (C. C. A. 8); *United States* v. *Messina*, 36 F. 2d 699, 701 (C. C. A. 2); *United States* v. *Dibella*, 28 F. 2d 805, 806 (C. C. A. 2), certiorari denied, 278 U. S. 658; *Seiden* v. *United States*, 16 F. 2d 197, 198–199 (C. C. A. 2); see also *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C. C. A. 2); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2); *Grantello* v. *United States*, 3 F. 2d 117, 120 (C. C. A. 8).[24]

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[23] Certainly, to paraphrase the language of this case, petitioner's services in connection with the operation of the still "did not convert Chirichillo's possession and control into the joint possession, custody and control of petitioner and Chirichillo, within the meaning of the law."

[24] Obviously, the evidential situation in this case is markedly different from one where officers come upon an illicit still and those working or present at the still, despite the circumstances, make no explanation of their relationship to the still or indulge in incredible explanation. *Barton* v. *United States*, 267 Fed. 174, 175–176 (C. C. A. 4); *United States* v. *Mann*, 108 F. 2d 354, 356 (C. C. A. 7); *United States* v. *David*, 107 F. 2d 519, 522 (C. C. A. 7); *Crabb* v. *United States*, 99 F. 2d 325, 327 (C. C. A. 10); *Czarnecki* v. *United States*, 95 F. 2d 32, 35 (C. C. A. 3); *Kelley* v. *United States*, 61 F. 2d 843, 845 (C. C. A. 8); *Mangiaracina* v. *United States*, 40 F. 2d 164, 166 (C. C. A. 8); *United States* v. *Messina*, 36 F. 2d 699, 700, 701 (C. C. A. 2); *Otto* v. *United States*, 29 F. 2d 504,

The only question which remains on this count is whether petitioner's services in connection with operating the still and manufacturing the alcohol can be considered as aiding and abetting Chirichillo's possession, custody and control of the still, a theory submitted to the jury in the judge's charge (R. 102). The cases cited above which absolved employees do not discuss their responsibility under the aider and abettor doctrine, but that may have been because the particular circumstances were thought to leave no room for the application of that principle. We perceive no reason why, in appropriate circumstances, that doctrine of responsibility may not be applied to the offense in question. *Cardinal* v. *United States*, 50 F. 2d 166 (C. C. A. 8), gave it sanction by approving a charge which, if the evidence had justified it, would have permitted one who, upon learning that an unregistered still had been set up on land he had leased, took no steps to terminate the unlawful use, to be convicted as an aider and

505, 506 (C. C. A. 7); *Colasurdo* v. *United States*, 22 F. 2d 934, 936 (C. C. A. 9); cf. *United States* v. *De Vito*, 68 F. 2d 837, 839 (C. C. A. 2); see also *Duckwitz* v. *United States*, 15 F. 2d 195 (C. C. A. 9). Working at a still is not, of course, inconsistent with possession of the still, and the Government on motion for a directed verdict is entitled to all reasonable inferences and presumptions which arise from the evidence as a whole. In the instant case, the farmhouse was deserted when the officers seized the still and the Government depended on Mrs. Vettor's testimony as to what had previously transpired to sustain the issues in the case.

abettor.[25] And we think one who has been stationed as a guard or lookout to prevent molestation of the possession, custody or control of an unregistered still may properly be convicted as an aider and abettor of the offense. But petitioner's activities are described in the evidence only as helping around in the operation of the still and in the manufacture of alcohol. While, as we have argued, this evidence was sufficient to make him an aider and abettor of an offense of such broad compass as carrying on illegally the business of a distiller, embracing as it does all the varied activities which together comprise the running of a distillery, the section upon which the second count is based has a narrow impact. To afford complete regulation and hence complete insurance of the revenue, Congress descended in that section to a specific phase of illegal operation of the distilling business, just as it did in other sections, such as, for example, that penalizing the making or fermenting of mash in an unauthorized distillery. In respect of an offense of such a limited character as that charged in the second count, the activity, to be culpable as aiding and abetting, must surely have some immediate relation to the

[25] In *United States* v. *Dellaro*, 99 F. 2d 781, 783 (C. C. A. 2) Judge Learned Hand does not deny that there may be aiding and abetting of the offense. He thinks merely that the lessor's participation must be more affirmative in character, i. e., if "he chose to relet after he had had knowledge of the use to which the premises were being put."

specific object which the statute has in view. See *United States* v. *Carlin*, 92 F. 2d 425, 426 (C. C. A. 2). The evidence as to petitioner's activity was too general, we think, to show that what he did constituted any assistance to Chirichillo in the latter's maintenance of his possession, custody and control of the still. It is settled that there must be some substantial evidence fairly tending to support a conviction in order to sustain it. *Mortensen* v. *United States*, 322 U. S. 369, 374; *Glasser* v. *United States*, 315 U. S. 60, 80; *Abrams* v. *United States*, 250 U. S. 616, 619; *Stilson* v. *United States*, 250 U. S. 583, 588. Evidence which does not rise above the level of suspicion, speculation, conjecture, or surmise is insufficient. *Galloway* v. *United States*, 319 U. S. 372, 387; *Sutton* v. *United States*, 131 F. 2d 108, 109 (C. C. A. 5); *United States* v. *De Vito*, 68 F. 2d 837, 839 (C. C. A. 2); *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C. C. A. 2); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2); *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8); *Lempie* v. *United States*, 39 F. 2d 19, 21 (C. C. A. 9).

Under long-settled and now elementary principles, petitioner's presence at the still, his knowledge of the existence of the still, his acquiescence in the situation, and his failure to bring the possessor to book, are not enough. This would, evidently, make him guilty of misprision of felony

(18 U. S. C. 251) but not of aiding or abetting the owner's possession. Clark and Marshall, *Law of Crimes* (4th ed., 1940), pp. 213–214.

C. *Count 3.* We think, for the same reasons that have been advanced as to the second count, that the evidence was insufficient as to the third count and, therefore, petitioner's motion for a directed verdict of acquittal should likewise have been granted as to that count. Count 3 charged Chirichillo, petitioner and others with making and fermenting a certain quantity of mash fit for distillation in an unauthorized distillery (*supra*, p. 4). Aside from the fact that there was no evidence that petitioner had any proprietary interest in the enterprise, Mrs. Vettor's testimony was that Chirichillo brought in ingredients for making the mash and was the only one who fed the ingredients into the mash tanks. The mash vats were in the attic of the house, whereas the still, evidently, was located in other portions of the premises. There is not a word in her testimony that petitioner supplied or brought in materials for making the mash or that he in any wise assisted in the making or fermenting of the mash; indeed, in respect of petitioner, the word "mash" is at no place mentioned in her testimony. There can be no doubt that the making and fermenting of the mash is a distinct process from the distillation process (see Encyclopedia Americana, vol. 9, "Distillation," "Distilled Liquors," and "Distill-

ing Industry").[26] Mrs. Vettor's testimony that petitioner helped in the operation of the still is, in our opinion, too general to support conviction of petitioner for assisting Chirichillo in the specialized activity to which the third count relates.

II

THE ADDITION OF THE MANDATORY FINES AND PENALTY TO THE PRISON SENTENCES WHICH PETITIONER HAD BEGUN TO SERVE DID NOT CONSTITUTE AN INVALID INCREASE OF PUNISHMENT

Each of the statutes on which counts 1, 2 and 3 were based (I. R. C., §§ 2833 (a), 2810 (a) and 2834, *supra*, pp. 3–4) makes mandatory the imposition of a fine *and* imprisonment. In addition, I. R. C., § 2810 (a), on which count 2 was based, requires the imposition of a $500 penalty. Due to an oversight, the trial judge, in sentencing petitioner on the morning of July 23, 1945, failed to impose the fines and penalty required. About

[26] The language of the mash section itself (I. R. C., § 2834) recognizes this distinction. Thus it provides:

> No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; * * *.

five hours later petitioner was recalled to the courtroom, and the judge added the minimum mandatory fines ($100 on each of counts 1 and 2, and $500 on count 3) and the mandatory penalty of $500 (on count 2).[27] In the interim, petitioner had been taken to the United States Marshal's detention room in Newark and from there removed to the Hudson County Jail in Jersey City, a federal place of detention, to await transportation to the place at which his prison sentences were to be served. (R. 113, 115, 116–117; see also R. 2–3.) Petitioner contends that the addition of the fines and penalty constituted an invalid increase of punishment because of the conceded fact (see 18 U. S. C. 709a) that he had meanwhile commenced service of his prison terms (Br. 19–21).[28] The contention, we submit, is without merit.

The statutes required the trial judge to impose not only imprisonment but also fines. The status of petitioner's first sentence was simply that it was incomplete. Petitioner had not

[27] No fines were imposed on counts 4 and 5 (see R. 2) as to which the court below reversed because of insufficiency of the evidence, since the statutes on which the counts were based, I. R. C. §§ 3321 (a) and 2803 (a) and (g), do not make the imposition of fines mandatory.

[28] Several weeks later petitioner was admitted to bail pending appeal (R. 135) and, so far as we can ascertain, has not recommenced service of his imprisonment sentences. Of course the addition of the fines on the second and third counts and the penalty on the second count need not be given consideration here if the Court should accept the view that the evidence was insufficient as to those counts.

started to serve a sentence which in its totality was a permissible sentence. While what was originally pronounced was permissible to the extent it went, no increase of this permissible portion occurred. It cannot matter, therefore, that petitioner had started service of this allowable segment. By filling up the gap so as to render the sentence which the law required, the trial judge was not increasing a sentence as to which the judicial power was exhausted because integrally it was all right and had passed into execution. All that he did by his two sentences was, in essence, to pass a single sentence which the law required. There is no basis for any contention that the "double jeopardy" provision was infringed.[29]

III

THE CHARGE TO THE JURY WAS NOT UNFAIR OR PREJUDICIAL

Finally, petitioner contends that portions of the trial judge's charge to the jury "delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government" (Br. 2, 21–29). With embellishments not disclosed by the record, he com-

[29] See *Braswell* v. *State*, 22 Ala. App. 119 (1927); *State* v. *Godwin*, 210 N. C. 447 (1936); *Commonwealth* v. *Hottle*, 139 Pa. Super. 128 (1940); *Nelson* v. *Foley*, 54 S. D. 382 (1929). See, also, Mr. Justice Rutledge's discussion of the salient principles in *Rowley* v. *Welch*, 114 F. 2d 499 (App. D. C.), to which may be added *In re Bradley*, 318 U. S. 50.

plains principally of the judge's remarks concerning the rights of the people in a criminal trial (Br. 21–22). But a reading of the entire portion of the charge (R. 106–107) from which petitioner quotes out of context the excerpts of which he complains, is sufficient to show that the judge equally stressed the rights of a defendant charged with crime and that he was as emphatic in his instructions to acquit if the jury thought the Government had not proved the defendants' guilt beyond a reasonable doubt as in his instructions to convict if they thought the defendants' guilt had been so proved. For example, he charged that "If you believe that the government has not borne its burden of proving the guilt of these defendants beyond a reasonable doubt, it is your bounden duty to return a verdict of not guilty or else you will be faithless to your trust" (R. 107). And when counsel for petitioner complained to the judge that from the intonation of his voice and striking of his desk the jury might have inferred that he was "arguing for a conviction," the judge was prompt to acquaint the jury with the nature of the exception, and specifically instructed them that he had no such intention and, in effect, that if they had gained such an impression, they should expunge it from their minds (R. 109–110), an instruction which, evidently, the trial judge was led to believe petitioner's counsel desired, since there is nothing to indicate that counsel at the time thought a mis-

trial was the only remedy. Additionally, the trial judge repeated his precautionary instruction only a few minutes later when counsel for Chirichillo echoed the objection made by petitioner's counsel (R. 111). Moreover, the summations of counsel are not contained in the record. It may be that the remarks of counsel for the defendants made advisable some statement by the trial judge that the interests of the people as well as those of the defendants should be given consideration. The trial judge was vigorous in language but not partial. We submit that there is no basis for a claim of reversible error.[30]

[30] The heavy drinking of Mrs. Vettor had been repeatedly emphasized by the defendants during the trial, with the result that the trial judge was required to devote considerable attention to that subject in his charge to the jury. See footnote 7, *supra*, p. 9. It was therefore not out of place, as petitioner contends (Br. 23), for the trial judge to instruct that the trial should not develop into a trial of "a poor bedraggled female", as contrasted with a trial of the defendants (R. 107). Moreover, objection to this portion of the charge was made only by counsel for Chirichillo. See R. 109–111.

While petitioner assails Mrs. Vettor's identification of him (Br. 27–28), the trial judge pointed out in his charge that Mrs. Vettor had testified that she saw petitioner, identifying him, at the still three times a week and that on cross-examination she picked his picture out of 55 which were shown to her, but he nevertheless left the question as to whether this was a credible identification to the jury (R. 105).

Also, when Mrs. Vettor's testimony is considered as a whole there is no real basis for petitioner's indication (Br. 27) that her testimony was involuntary. Cf. her cross-

CONCLUSION

For the reasons indicated, we respectfully submit that the judgment of the circuit court of appeals should be affirmed as to the first count and reversed as to the second and third counts.[31]

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DECEMBER 1946.

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examination at R. 39 with her later cross-examination at R. 40 and her redirect examination at R. 42. Moreover, the jury was specifically instructed that in weighing Mrs. Vetor's credibility they should take into consideration whether her testimony was influenced by expectation or hope of reward, or threat (R. 98).

[31] If the Court should be of the view that it has the power, it could, of course, remand the case as to the second and third counts to the district court for the entry of a judgment of acquittal on those counts, in accordance with the practice discussed and followed by the court below in respect of the fourth and fifth counts (R. 143–144). See also *Seiden* v. *United States*, 16 F. 2d 197, 199 (C. C. A. 2), where, under comparable circumstances, the circuit court of appeals modified a sentence by reducing the fines and affirming the judgment below as so modified.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1946.

Zachary Bozza, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner and one Chirichillo were convicted in a Federal District Court on all counts of a five-count indictment against them which charged violation of the Internal Revenue laws in connection with the operation of a still. The Court of Appeals reversed petitioner's conviction on counts four and five because of insufficient evidence, but affirmed as to counts one, two, and three. 155 F. 2d 592. We granted certiorari. —U. S. —. Count one charged that the defendants had carried on "the business of a distiller . . . with intent willfully to defraud the . . . United States of the tax on . . . spirits so distilled . . ." in violation of 26 U. S. C. § 2833 (a). Count two charged them with having had possession and custody of the still in violation of 26 U. S. C. § 2810 (a). Count three charged that they had made and fermented mash for the production of alcohol in violation of 26 U. S. C. § 2834. It is argued that the evidence was insufficient to support any of the three counts here at issue. The Government concedes its insufficiency as to counts two and three.

There was testimony to show the following: Chirichillo rented a farmhouse under an assumed name and installed a 300-gallon still with all equipment necessary to ferment mash and distill alcohol. The still was operated day and night. Chirichillo himself mixed the ingredients to make the mash in the attic of the 2½-story frame building, but the alcohol distillation was carried on in another part of

the building. Petitioner was at the house two or three times a week. When there he took instructions from Chirichillo and helped him in the operation of the still; he helped manufacture the alcohol. When Chirichillo carried his products to Newark, the car in which he carried the illicitly distilled alcohol would follow along behind another car—sometimes petitioner's, sometimes another helper's. The farmhouse where the illicit business was carried on appeared from the outside to be deserted; the windows were without shades and the house had been practically stripped of furniture.

We accept the Government's concession that the evidence fails to show that this petitioner had made, or helped to make, the mash as charged in count three. All of the evidence showed that Chirichillo alone handled and mixed the ingredients of the mash, and there is nothing whatever to indicate that the petitioner ever took any part in, or aided and abetted, this particular part of the unlawful process in any manner, or, indeed, that he was ever in or around the attic where the mash was made from ingredients stored there. The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it.

The sufficiency of the evidence as to count two which charged that the petitioner had custody or possession of the still is a closer question. It might be possible that petitioner's helping to make the alcohol aided and abetted

in its "custody or possession." But that would be a very strained inference under any circumstances. Here again the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised, or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of "custody and possession" so nearly as it resembles the transportation of illegal liquor, 26 U. S. C. § 2803—an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout, or in some other similar capacity. Under these circumstances, we accept the Government's concession that a judgment of guilty should not have been rendered on the second count.

We think there was adequate evidence to support a finding of guilt on the first count which charged operation of the business of distilling to defraud the Government of taxes. There was certainly ample evidence to show that Chirichillo carried on the business of a distiller and that the petitioner helped him to do it. 18 U. S. C. § 550 provides that one who aids and abets another to commit a crime is guilty as a principal. Consequently, the jury had a right to find, as it did, that the petitioner and Chirichillo were equally guilty of operating the business of the distillery. See *United States* v. *Johnson*, 319 U. S. 503, 515, 518.

But, it is argued, there was no evidence that the petitioner acted with knowledge that the distillery business was carried on with an intent to defraud the Government of its taxes. The same evidence as to knowledge of this guilty purpose, however, that applied to Chirichillo was almost, if not quite, equally persuasive against both

defendants. Petitioner assisted in the manufacture of alcohol in Chirichillo's still which was operated under conditions of secretiveness in an apparently abandoned farmhouse. The finished alcohol was carried to Newark in a car which followed another car, sometimes the petitioner's. The members of the jury could properly draw on their own experience and observations that lawful stills, unlike the still in which petitioner worked, usually are not operated clandestinely and do not deliver their products in the fashion employed here. The members of the jury were not precluded from drawing inferences as to fraudulent purposes from these circumstances, nor were they compelled to believe that this petitioner was oblivious of the purposes of what went on around him. Men in the jury box, like men on the street, can conclude that a person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: "The Revenuers are coming!" We hold that the verdict of guilty on the first count must stand.

The only statute for violation of which petitioner's conviction is sustained by us carries a minimum mandatory sentence of fine of one hundred dollars *and* imprisonment, 26 U. S. C. § 2833 (a). In announcing sentence at a morning session, the trial judge mentioned imprisonment only. Thereafter the petitioner was taken briefly to the U. S. Marshal's office and then to a local federal detention jail awaiting transportation to the penitentiary where he was finally to be confined. But about five hours after the sentence was announced, the judge recalled the petitioner and according to stipulation, stated in the presence of petitioner and his counsel that "in the imposition of sentence this morning . . . it has been called to my attention that there are certain mandatory fines and penalties which I

omitted to impose. For the record now minimum mandatory fines and penalties will be imposed." Thus a one hundred dollar fine was fixed, as required by law, along with the imprisonment sentence. Petitioner charges that this action constituted double jeopardy forbidden by the Federal Constitution.

It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, *Reynolds* v. *United States*, 98 U. S. 145, 168–169; *Murphy* v. *Massachusetts*, 177 U. S. 155, 157, or in habeas corpus proceedings. *In re Bonner*, 151 U. S. 242. But in those cases it was recognized that an excessive sentence should be corrected, even though the prisoner had already served part of his term, not by absolute discharge of the prisoner, but by an appropriate amendment of the invalid sentence by the court of original jurisdiction, at least during the term of court in which the invalid sentence was imposed.[1] *Cf. De Benque* v. *United States*, 85 F. 2d 202. In the light of these cases, the fact that petitioner has been twice before the judge for sentencing and in a federal place of detention during the five hour interim cannot be said to constitute double jeopardy as we have heretofore considered it. Petitioner contends, however, that these cases are inapplicable here because correction of this sentence so as to make it lawful increases his punishment. *Cf. United States* v. *Benz*, 282 U. S. 304, 309. If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all. *Cf. Jordan* v. *United States*, 60 F. 2d 4, 6 with *Barrow* v. *United States*, 295 Fed. 949. This Court has rejected the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in pass-

[1] Compare Rule 45c, Rules of Criminal Procedure for the District Courts of the United States.

ing the sentence." *In re Bonner, supra* at 260. The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. See *King* v. *United States*, 98 F. 2d 291, 296. In this case the court "only set aside what it had no authority to do and substituted directions required by the law to be done upon conviction of the offender." *In re Bonner, supra* at 260. It did not twice put petitioner in jeopardy for the same offense.[2] The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense.

Other contentions here do not merit our discussion. The judgment as to count one is affirmed. The judgment is reversed as to counts two and three.

It is so ordered.

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[2] In *Ex parte Lange*, 18 Wall. 163, relied on by petitioner here, the defendant had been sentenced to fine *and* imprisonment for violation of a statute which authorized a sentence only of fine *or* imprisonment. Since he had paid his fine and therefore suffered punishment under a valid sentence, it was held that his sentence had been "executed by full satisfaction of one of the alternative penalties of the law. . . ." *Murphy* v. *Massachusetts*, *supra* at 160. Therefore, Lange's plea, that the trial court could not correct the sentence without causing him to suffer double punishment, was sustained. *Cf. In re Bradley*, 318 U. S. 50. But here the petitioner had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine.

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1946.

Zachary Bozza, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 17, 1947.]

Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge dissenting as to the affirmance of the judgment on count one.

We are of the view that to convict one as an aider and abetter in engaging in or carrying on a distillery business with intent "to defraud" the United States of the tax on the distilled spirits, 53 Stat. 319, 26 U. S. C. § 2833 (a), evidence is necessary which shows that by some act of concealment he promoted the fraud, or by counsel and advice furthered the unlawful scheme, or in fact had some interest in the project.[1] See *United States* v. *Cooper*, 25 Fed. Cas. 627, 629; *United States* v. *Logan*, 26 Fed. Cas. 990, 992; *Seiden* v. *United States*, 16 F. 2d 197, 199; *Partson* v. *United States*, 20 F. 2d 127, 129; *Anderson* v. *United States*, 30 F. 2d 485, 487. Aiding and abetting in the illicit manufacture of liquor is one thing.[2] Aiding and

[1] Judge Learned Hand, after reviewing the various definitions of aiding and abetting, said: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it." *United States* v. *Peoni*, 100 F. (2d) 401, 402.

[2] Thus § 2833 (a) makes it an offense to "carry on the business of a distiller without having given bond as required by law." Section 2834 makes it unlawful to make or ferment mash, fit for distillation, in any building or on any premises other than an authorized distillery.

abetting in carrying on the business with intent to defraud the United States of a tax is quite a different matter, and requires a different test, if the two offenses are not to be blended. The evidence in the case and the instructions given the jury [a] seem to us inadequate to sustain a conviction under count one, charging Bozza with aiding and abetting in a tax fraud scheme.

In view of this conclusion, MR. JUSTICE RUTLEDGE reserves expression of opinion concerning the legality of the sentence.

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[a] ". . . if you find that he was merely an underling, serving at the beck and call of an employer and nothing more than that (sic) would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal. . . . Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abettor the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction." While the above charges were requested by defendant, we nevertheless feel that the failure of the instructions to satisfy the standard we suggest is an error which we should notice. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.